P.E.R.C. NO. 2006-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2005-073

NEWARK FIRE OFFICERS UNION,
IAFF LOCAL 1860, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Newark Fire Officers Union, IAFF Local 1860, AFL-CIO. The grievance alleges that the City violated the parties' collective negotiations agreement when it changed the schedule for closing fire companies so that it corresponds with the work schedule of firefighters rather than the work schedule of fire officers. As a result, fire officers have to report to a different fire house once every eight-day cycle. The Commission concludes that a fire officer's occasional reassignment to another company does not appear to change any negotiable employment condition and the Commission accepts the chief's assurance that reassigned captains do not have to share command or perform administrative responsibilities or additional duties. The Commission thus concludes that these reassignments are not mandatorily negotiable. The Commission also determines that even though the issue is not mandatorily negotiable, enforcement of the Union's claim would place substantial limitations on government's policymaking powers. The Commission holds that neither it nor an arbitrator can second-guess the City's belief that it would be more efficient and leads to more seamless accountability to reassign individual fire captains rather than groups of firefighters. That is a governmental policy determination that remains outside the scope of collective negotiations.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2006-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2005-073

NEWARK FIRE OFFICERS UNION,
IAFF LOCAL 1860, AFL-CIO,

Respondent.

Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation Counsel (Carolyn A. McIntosh, on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys (Paul L. Kleinbaum and Jason E. Sokolowski, on the brief)

DECISION

On April 25, 2005, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Newark Fire Officers Union, IAFF Local 1860, AFL-CIO. The grievance alleges that the City violated the parties' collective negotiations agreement when it changed the schedule for closing fire companies so that it corresponds with the work schedule of firefighters rather than the work schedule of fire officers. As a result, fire officers have to report to a different firehouse once every eight-day cycle.

The parties have filed briefs and exhibits. The City has filed the certifications of Lowell Jones, its Fire Director, and Norman Esparolini, its Fire Chief. The Union has filed the certification of John Sandella, its President. These facts appear.

The Newark Fire Department consists of four battalions and approximately 108 fire companies, with seven or eight truck and engine companies in each battalion. Each company typically consists of one captain and three or four firefighters. The Union represents deputy chiefs, battalion chiefs, and captains. Each company is assigned to a firehouse and several firehouses have more than one company assigned to them. Each battalion employs four tours or shifts of firefighters and fire officers.

In 1990, the City decided to close fire companies on a rotational basis to avoid layoffs. During every tour, three fire companies are closed. Each closed company is located at a firehouse with multiple companies so that no firehouse is ever closed. The companies designated to be closed on each tour have remained the same since 1990.

Before 2002, both the firefighters, represented by the Newark Firefighters Union, and the fire officers worked the same 10/14 schedule. They worked two 10-hour days followed by 24 hours off, followed by two 14-hour nights, followed by 72 hours off. The rotational schedule for closing fire companies

coincided with this common work schedule. Thus no firefighters or fire officers had to be reassigned due to company closings.

A Memorandum of Agreement was signed on February 28, 2002 extending the contract until December 31, 2004. As part of the memorandum, the parties negotiated a new work schedule. Under that schedule, fire officers work 24 hours on, followed by 48 hours off, followed by 24 hours on, followed by 96 hours off. Section 17.05 of the work schedule article provides:

> The rotational closings will correspond to the officers' schedule to insure continuity and avoid undesirable effect of downtime caused by officers moving between companies in the middle of a shift.

In June 2002, the fire officers began working the new 24/48/96 work schedule. Firefighters remained on the 10/14 work schedule. The rotational schedule for closing fire companies was simultaneously changed to coincide with the new 24-hour shift for fire officers rather than the 10/14 schedule for firefighters.[1/] According to Jones, had the rotational closings not been changed to coincide with the fire officers' work schedule, fire officers would have had to change companies mid-way through their shifts,

---

1/ The NFU filed an unfair practice charge asserting that the City had refused to negotiate with it concerning issues arising from the change in the fire officers' work schedule and impacting on the firefighters' employment conditions. One such impact issue was the change in the rotational closing of fire companies. The NFU's request for interim relief blocking the work schedule change pending impact negotiations was denied. I.R. No. 2002-11, 28 NJPER 257 (¶33098 2002)

resulting in downtime and disruption. Further, officers could not leave their companies until replacements arrived and their replacements might be delayed if they were busy responding to a fire at the mid-point of a shift. While firefighters had to report to different companies, they did not have to do so in the middle of a shift and they knew up to one year in advance of the date and location of a reassignment.

On January 31, 2003, the City changed the work schedules of both fire officers and firefighters to a 24/72 schedule. It simultaneously changed the schedule for rotational closings of fire companies to correspond to the 24/72 schedule. Given that fire officers and firefighters were working the same schedule, company closings did not require the reassignment of either officers or firefighters to different companies.

The Union filed a grievance asserting that the change in the fire officers' work schedule violated the contract and an April 2002 grievance settlement. On April 25, 2004, an arbitrator sustained this grievance.

On June 14, 2004, the City issued Notice #59, restoring the 24/48/96 work schedule for fire officers. However, the notice also stated:

> The tour rotational closings ***will not*** change. When the company the Officer is assigned to is *rotationally closed*, the Company Officer will rotate to the appropriate assignment.

Firefighters continue to work a 24/72 schedule.

According to the Fire Director, the department

> enjoys operational efficiency synchronizing the rotational schedule with the firefighters' tour. By doing so, the department minimizes the number of employees who are detailed per tour and makes for more seamless accountability of employees. Operationally, it is more practical to detail three fire officers due to rotational closures than it is to detail three entire companies of firefighters.

Since deputy chiefs and battalion chiefs do not work at firehouses, only fire captains are affected by the schedule for company closings. The captains know up to one year in advance of the dates and location of reassignments. Reassignments due to closings have no impact on salary, seniority, longevity, or accommodations such as beds and lockers.

The Fire Director states that the reassignments do not have any impact on the fire officers' duties. But the Union President asserts that a captain's work is "essentially doubled" because the reassigned captain must report to two duty stations and share command with another fire officer at that station, including responsibility for target hazard areas and pre-fire plans for that location that might be very different from the captain's normal location – e.g., near a chemical storage facility as opposed to a school. The Fire Chief, in turn, has filed a certification stating that a reassigned fire captain is not expected to perform any duties beyond supervising the firefighters in his or her company and is not expected to

supervise two companies simultaneously or to share command. Nor is the fire officer required to perform any administrative duties concerning the company to which he is reassigned - - the captain who is regularly assigned to that company retains responsibility for such matters as generating inspection reports, and handling vacation selections, accounting of personal days, and mutual swaps. The Fire Chief also states that target hazards (e.g. hospitals, universities, government offices, and industrial facilities) exist throughout the City and all fire personnel must be capable of conducting fire operations at all hazards. Cross training and familiarity with structural and geographical differences are paramount to building well-rounded fire officers and firefighters.

Fire officers already work in different fire companies, firehouses, and even battalions when mutual swaps occur or officers volunteer for overtime assignments. However, firefighters are also detailed to other companies almost daily given mutual swaps, overtime assignments, and roll call balancing. The Union President contends that it would seem more operationally sensible to reassign firefighters instead of fire officers.

On July 6, 2004, the Union filed a grievance alleging that the City violated the 2002 Memorandum of Agreement by not ordering that the rotational closings correspond with the

firefighters' work schedule rather than the fire officers' schedule. The City did not respond to the grievance and the Union demanded arbitration. This petition ensued.

Our scope jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

Thus we do not consider the merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81

> (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [Id. at 92-93; citations omitted]

Arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

A decision to reassign an employee is generally not mandatorily negotiable. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568-574 (1998); Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), aff'd 31 NJPER 287 (¶112 App. Div.

2005). Although an employee's assignment has an appreciable effect on his or her welfare, that impact is outweighed by the managerial interest in deploying personnel in the manner the employer considers best suited to the delivery of governmental services. Ridgefield Park. However, the balance may shift if a reassignment implicates other negotiable employment conditions such as work hours. See, e.g., City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990). A fire officer's occasional reassignment to another company does not appear to change any negotiable employment condition. There is no impact on employee work hours or compensation. While the Union argues that the reassignments essentially double a fire officer's workload, the details of the Fire Chief's reply certification clarify that a reassigned captain is not required to share command or perform any administrative responsibilities or additional duties. Accordingly, we conclude that the subject of these reassignments is not mandatorily negotiable.

Under Paterson, we must make one last determination: even though the issue is not mandatorily negotiable, would enforcement of the Union's claim place substantial limitations on government's policymaking powers? The answer is yes in this case and so arbitration must be restrained. Because the work schedules for fire officers and firefighters differ, any schedule for closing fire companies would result in either firefighters or

fire officers being periodically reassigned to different fire companies. The City believes that it is more efficient to reassign individual fire captains rather than groups of firefighters and leads to more seamless accountability and neither we nor an arbitrator can second-guess these conclusions. That is a governmental policy determination that remains outside the scope of collective negotiations. We will therefore restrain binding arbitration.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo and Watkins voted in favor of this decision. None opposed. Commissioners Fuller and Katz were not present.

ISSUED: November 22, 2005

Trenton, New Jersey